IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.550 OF 2005
IN
EXECUTION APPLICATION NO.18 OF 2004
IN
HONG KONG ACTION NO.4761 OF 2001

Sukim Bussan International
(Hong Kong) Limited,
Suite No.2001-6, Tower No.2,
Gateway Harbour City, Nos.25-27, ...Plaintiffs
Kawloon Road, Hong Kong. (Judgment Creditors)

Versus

1.King Shing Enterprise Ltd.
Room No.1605, 16th Floor,
Citicrop Center, 18,
Whitfield Road, Causeway Bay,
Hong Kong.

2.Manharlal Trikamdas Mody,
Apartment C-14, 14th Floor,
Block C, Victoria Court,
50-56 Hing Fat Street, ...Defendants
Hong Kong. (Judgment Debtors)

And

ING Bank N.V., a banking company
incorporated under the laws
prevailing in Netherlands, and
having its office at Embassy Center,
4th Floor, Nariman Point,
Mumbai - 400 021. ...Applicants

.....

Mr.Pravin Samdani i/b DSK Legal for Applicants.

Mr.Rafiq Dada, Senior Counsel with Mr.Pratik
Sakseria i/b Khaitan & Co. for Judgment Creditor.

Mr.Jay Raut i/b Prem Ranga for Defendant No.2.

.....

CORAM: A.M.KHANWILKAR, J.

SEPTEMBER 6, 2005.

ORAL JUDGMENT :

1. Heard Counsel for the parties. Perused the pleadings.

2. This Chamber Summons is taken out by third party ING Bank N.V. under Section 47 read with Order XXI Rules 58 and 64 of the Code of Civil Procedure, 1908. The broad facts leading to the filing of the present Application are as follows :

. That Judgment and Decree was passed in favour of the Plaintiffs on 31st May 2002, in action No.4761 of 2001, by the High Court of Hong Kong, Special Administrative Region, Court of First Instance, holding the Judgment Debtors liable for payment of U.S.D. 6,18,331.26, interest and cost. The Judgment Debtor No.2 appealed against the said order which came to be dismissed by the High Court

of Hong Kong on 8th August 2002. On the basis of the said decree, execution proceedings were initiated by the Judgment Creditors for recovery of Rs.3,48,94,644.84 (Rupees Three Crores Forty-eight Lakhs Ninety-four Thousand Six Hundred Forty-four & Paise Eighty-four) together with interest on Rs.2,87,75,671.34 (Rupees Two Crores, Eighty-seven Lakhs Seventy-five Thousand Six Hundred Seventy-one & Paise Thirty-four) at the rate of 5.2% per annum from 18th January 2001 till 31st May 2002 and at the rate of 8% thereafter and for cost as on February 2003. In the said execution proceedings, Flat No.20/1 which is the subject matter of the present Application situated at Silver Arch Building, Malabar Cooperative Housing Society, Napean Sea Road, Mumbai, came to be attached. The Judgment Debtor No.2 has been prohibited from dealing with the said flat in terms of order dated 27th June 2003 passed in Chamber Summons 777 of 2003. Besides, warrant of sale in respect of the said flat came to be issued on 21st May 2004. Suffice it to observe that further steps have been taken including issuance of proclamation of sale in respect of the said flat. The Applicant Bank, who

is third party, has filed the present Application on 21st April 2005 for the following reliefs:

> "(a) that this Hon'ble Court be pleased to declare that the Flat No.20/1, admeasuring 3300 sq.ft. on the 20th floor of Silver Arch, 66 Napean Sea Road, Mumbai ("Flat") is not liable to be sold under the proclamation of sale on the terms and conditions as settled on march 25, 2005;
>
> (b) that this Hon'ble Court be pleased to set aside the proclamation of sale;
>
> (c) in the alternative of prayer (b) above, this Hon'ble Court be pleased to amend the terms and conditions of sale and recognize the right of the Applicants to be in possession of the Flat till the amount of the Security Deposit of Rs.3,25,00,000/- along with the accrued interest thereon is refunded to the Applicants as per the terms and conditions of the License Agreement';
>
> (d) that this Hon'ble Court be pleased to stay the sale of the Flat and direct that the status quo be maintained by the parties to this Chamber Summons till the right of the Applicants over the Flat is recognized or till the refund of the Security Deposit to the Applicants;
>
> (e) that this Hon'ble Court be pleased to declare that the Applicants have a lien and charge over the Flat and they have a lien on possession equivalent to charge under a duly registered License Agreement and have a right to possess, occupy, use and enjoy the Flat;
>
> (f) that pending the hearing and final disposal of this Application or the execution application the Defendants

and/or the Plaintiffs by themselves, their servants and the agents or in any manner be restrain by an order and injunction from this Hon'ble Court from in any manner dispossessing the Applicants from the Flat;

(g) that pending the hearing and final disposal of this Application this Hon'ble Court be pleased to stay the sale of the Flat and direct that the status quo be maintained by the parties to this Chamber Summons till the right of the Applicants over the Flat is recognized or till the refund of the Security Deposit to the Applicants;

(h) that pending the hearing and final disposal of this Application this Hon'ble;e Court be pleased to direct the Plaintiffs and the Sheriff of Mumbai to amend the terms and conditions of sale of the Flat and incorporate therein the right of the Applicants to be in possession of the Flat till refund of the Security Deposit along with accrued interest thereon;

(i) for Interim and ad-interim reliefs in terms of prayers (f), (g) and (h) above;

(j) that the costs of the Chamber Summons be provided for;

(k) for such other and further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

3. The case made out by the Applicants is that the Applicants are in possession of the said residential flat pursuant to an Agreement entered

into with Judgment Debtor No.2 and his wife who are the owners thereof dated October 8, 2001. As per Clause 8 of the said Agreement, the agreement was a mere licence and did not create any right, title or interest in favour of the licensee. Clause 9 provides that the Licensee shall be deemed to be in juridical possession. Clause 10 provides that the provisions of Section 24 of the Maharashtra Rent Control Act would apply to the agreement i.e. the licensee was required to return possession of the premises on the expiry of the period of the licence. Under the said Agreement, the Applicants have paid sum of Rs.3 crores 25 lakhs to the owners as refundable security deposit. The Agreement so executed has been duly registered on 15th May 2002. The said Agreement authorises the Applicants to occupy the premises initially on Leave and Licence basis for a period of twenty-two months, which period was to expire on 31st July 2003. On completion of the licence period, the Applicants were obliged to hand over vacant possession of the said flat to the owners on receiving the security deposit of Rs.3 crores 25 lakhs already made over to the owners under the Agreement. In case, the

owners failed to pay the security deposit, the Applicants were entitled to remain in possession till the said amount was received by the Applicants. On this assertion, the Applicants have approached this Court by way of present Chamber Summons for the reliefs already reproduced earlier.

4. According to the Applicants, on fair reading of the Agreement executed between the Applicants and the owners, that would create right of mortgage in favour of the Applicants. Inasmuch as the owners have transferred their right to actual possession in favour of the Applicants, which is one of species of full ownership. If it is so, the said flat can be sold, keeping the said rights of the Applicants intact. Without prejudice to the above submission, it is further contended that in any case, the nature of arrangement provided under clause 28 of the Agreement would create right of lien in favour of the Applicants and the property in question can be disposed of, keeping the right of lien of the Applicants in respect of the said flat unaffected.

5. On the other hand, this Chamber is resisted only by the Judgment Creditors/Plaintiffs. According to the Judgment Creditors, the Agreement in favour of the Applicants is nothing but a Licence Agreement. On a true and proper construction of the said document, in particular, clause 8 to 10 thereof, it is seen that no right, title or interest of any nature whatsoever is created in favour of the Applicants. It is then submitted that failure to refund the security deposit would arise only upon termination of licence. Relying on the decision of our High Court reported in **1998 (2) Mh.L.J. 35 in the case of The Hongkong & Shanghai Banking Corporation Ltd. vs. Diamant Borat India Pvt.Ltd. & Anr.**, it is contended that the Judgment Creditors will have the right to sell the property in execution of the decree, free of licence. It is then contended that the Agreement pressed into service on behalf of the Applicants is nothing but simplicitor agreement of licence in favour of the Applicants. The fact that the said Agreement is registered, will not create any further right in favour of the Applicants, except that of licensee. The Agreement has been

registered as per the requirement of the provisions of The Maharashtra Rent Control Act, 1999 read with the provisions of Article 36A of the Bombay Stamp Act, 1958. It is contended that if the Agreement were to be an agreement of mortgage, it was required to be registered as mortgage under Article 40, for which, the stamp duty would have been Rs.32,15,000/- (Rupees Thirty-two Lakhs Fifteen Thousand). In substance, it is argued that the transaction in favour of the Applicants is one of licence. In view of provisions of Section 59 of The Indian Easements Act, 1882, a transferee is not bound by the said licence as has been observed in series of decisions reported in **A.I.R. 1931 Mad. 216 in the case of Chinnan & Ors. vs. Ranjithammal, 1986 Mad.L.J. 212 in the case of Ram Seeta Educational Trust vs. The Swarnapuri Co-operative House Building Society Ltd. and 2003 (4) Bom.C.R. 745 in the case of Suresh Malappa Shetty vs. Special Recovery Officer.**

6. It is argued that if the stand taken on behalf of the Applicants was to be accepted, it would result in a situation that the Applicants may

have to be treated as most preferred creditors though they were occupying the premises in question only on account of personal privilege extended in their favour by the owners. It is lastly submitted that if at all the Applicants will have a claim for breach of compromise as against the owner (Judgment Debtor No.2), the Agreement being the personal privilege, cannot be specifically enforced. The Applicants can, at best, claim damages against the Judgment Debtor No.2. On the above submissions, Counsel for the Judgment Creditor contends that the present Chamber Summons be rejected.

7. As mentioned earlier, this Chamber Summons has been contested only by the Judgment Creditors. Counsel appearing for the Judgment Debtor No.2, though present in Court, fairly accepted the existence of Agreement executed in favour of the Applicants which indeed is a registered document. The Judgment Debtor also accepts the obligation flowing from the said Agreement requiring the Judgment Debtor along with his wife to pay the amount referred to therein to the Applicants and recognises the right of the Applicants to remain in

occupation of the premises in question, till such amount was paid to the Applicants.

8. Learned Counsel for the Judgment Debtor No.2, however, wanted me to examine the efficacy of declaration in insolvency proceedings against the Judgment Debtor no.2 pending before the Singapore Court. He also submitted that the Court may consider the fact that the flat was jointly owned by the wife of Judgment Debtor No.2. However, it is not necessary for me to widen the scope of the present proceedings. Those issues are not relevant for deciding the point that arises for consideration in the present Application taken out by the Applicants for limited relief. It is seen from the record that in fact, wife of Judgment Debtor No.2 had taken out separate application being Chamber Summons No.318 of 2005, challenging the action of attachment and the sale of the flat on grounds as were available to her stated in the said Chamber Summons. However, the said Chamber Summons has been dismissed for non-prosecution on 1st August 2005, being Chamber Summons No.318 of 2005 and no steps have been taken to get the said

Chamber Summons restored so far. Indeed, it is brought to my notice by the Counsel for the Applicants as well as the Judgment Creditors that the issue regarding efficacy of declaration in insolvency proceedings against the Judgment Debtor No.2 in Singapore Court was raised before the Division Bench in Appeal No.403 of 2005 which has been answered against the Judgment Debtor No.2 in order dated 26th June 2005. Be that as it may, as mentioned earlier, it is not necessary for me to examine those aspects.

9. The controversy that arises in the present proceedings, in my opinion, will have to be addressed on the basis of finding regarding the nature of agreement executed in favour of the Applicants by the owners dated 8th October 2001, which is a registered agreement. Indeed, going by the description of the said document as well as the recitals and the various clauses in the Agreement, it would give an impression that it is purely a Leave and License Agreement with no right, title or interest flowing in favour of the Applicants in respect of the said flats. In the said Agreement,

at more than one place, it has been reiterated that the arrangement between the parties is simplicitor one of licence and a personal privilege extended in favour of the Applicants. However, I find substance in the arguments canvassed on behalf of the Applicants that the document will have to be read as a whole and if so read, Clause 28 read with Clause 19 of the Agreement would unerringly point out that the arrangement arrived at between the owners and the Applicants in respect of the said flat was in the nature of mortgage. This is so because Clause 19 of the Agreement provides that in the event, the owners desire to sell or dispose of the licensed premises during the period of the licence, they shall be entitled to do so, without affecting the rights of the Applicants and such sale or the disposal was subject to the rights of the Applicants under the said Agreement. The right provided to the Applicants under the said Agreement is spelt out from Clause 28, which in turn, provides that in the event of failure on the part of the owners to refund the security deposit (sum of Rs.3 crores 25 lakhs) or any part thereof to the Applicants, the Applicants shall until the owners

refunded the entire security deposit, were entitled to continue to use and occupy the said premises without payment to owners of any licence fee or compensation and such staying over by the Applicants in the premises was not to constitute the default of the Applicants under the Leave and Licence Agreement and the owners were not entitled to renew the Bank guarantee given by the Applicants in terms of the Agreement. Said Clause 28 further provides that without prejudice to the Leave and Licence Agreement and notwithstanding anything contained therein, the security deposit shall, upon the date of expiry or termination of the licence and from the date on which Applicants were willing to hand over vacant charge of the licensed premises, bear and carry interest at the rate of 2% per month or part thereof till repayment or realisation of the security deposit. This clause, in my opinion, is a crucial clause to decide the nature of transaction between the parties. The agreement is a composite agreement one of leave and licence and of security deposit. The latter part of the Agreement, in particular, clause 28 is an agreement of security deposit. The term of licence

provided under the Leave and License Agreement expired on 31st July 2003. On and from that date onwards, the agreement of security deposit came into effect, on account of which, the Applicants became entitled to retain possession of said premises, until the entire amount of security deposit being sum of Rs.3 crores 25 lakhs was made over to them along with interest at the rate of 2% per month. This arrangement clearly indicates that the owners transferred their right of possession in the disputed premises in favour of the Applicants. The Applicants have rightly relied on the exposition in the decision of Full Bench of Allahabad High Court as reported in **1885 ILR All.Series (Vol.VII) 553 in the case of Indar Sen & Anr. vs. Naubat Singh & Ors.** The question posed before the Full Bench may not be relevant for our purpose. The question as was posed has been articulated at page 555 as follows :

> "The question is, whether a zamindar, who mortgages his mahal by usufructuary mortgage, and gives possession to the mortgagee, parts with his proprietary rights by that transaction."

10. What is relevant for our purpose is the dictum of Mahmood J., which has considered the proposition of jurisprudence that dominion is an aggregate of component rights, such as the right of actual possession, the right of enjoying the usufruct of land, the power of sale and so on. The relevant portion, which I may adopt as reason for answering the issue that the right created in favour of the Applicants under the security deposit agreement, is one of mortgage. Justice Mahmood has referred to the observations of Austin, J. in the following words:

> "The idea of absolute property is a right indefinite in point of user, unlimited in extent of duration, and alienable by the actual owner from every successor who, in default of alienation by him, might take the subject of it."

. Observation of Austin, J. has been referred by Mahmood J. to answer the meaning of full ownership being composed of rights:

> "indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration."

. It is then observed that any alienation of these rights would be a mortgage, so long as the object of the alienation was security for the payment of a debt in money. Justice Mahmood then went on to quote observations of another jurist as follows:

> "that any "one or more of the subordinate elements of ownership, such as a right of possession or user, may be granted out while the residuary right of ownership, called by the Romans nuda *proprietas*, remains unimpaired. The elements of the right which may thus be disposed of without interference with the right itself, -in other words, which may be granted to one person over an object of which another continues to be the owner, - are known as *jura in re aliena*."
>
> (emphasis supplied)

. I would adopt the above quotation to hold that the right, which flows in favour of the Applicants on account of Clause 28 of the Agreement is one constituting mortgage. The nature of transaction in the present case would be covered by the expansive term of Anomalous mortgage within the meaning of Section 58 (g) of the Transfer of Property Act, 1882.

11. To get over this position, Counsel for the Judgment Creditor placed reliance on the decision of our High Court in **The Hongkong & Shanghai Banking Corporation Ltd. (supra).** My understanding of this Judgment is that the question that is posed before me was not put in issue and in any case, has not been answered in the said Judgment. Whereas, on the fact situation of that case, the Court proceeded to hold that the Agreement in question was a Leave and License Agreement and created only personal privilege and nothing more. In that case, two agreements were executed between the parties on the same date. One pertained to Leave and License Agreement and the other was Security Deposit Agreement. Insofar as the Security Deposit Agreement is concerned, the Court did examine the stand taken on behalf of the opposite party that the transaction was one in the nature of lien under the security deposit agreement. However, it proceeded to observe that as the said Agreement was not registered as was required by Section 17(1)(b) of the Registration Act, the same was of no avail to the concerned

party. It is on that basis, the issue has been answered in the said decision. According to the learned Counsel for the Plaintiffs, however, the Court was specifically called upon to consider the purport of Security Deposit Agreement and on analysing the said Agreement, it has found that the same has the effect of creating license in favour of the party. I am afraid, it is not possible to accept this submission. The argument which was canvassed on behalf of the bank in that case has been articulated in Para 8 of the said Judgment. The first point argued was that the Leave and License Agreement read with Security Deposit Agreement was in the nature of personal privilege and it cannot be compared to a contractual obligation in favour of the purchaser of immovable property under the contract of sale in respect of the immovable property. The second contention raised was that the moment the right of licensor comes to an end by virtue of sale of the property pursuant to the Consent Decree, right of the Applicants also comes to an end because the Applicants only had a personal privilege. The short point canvassed was that if the stand of the

licensee was to be accepted, it would mean that the lien of the license stood extended till the Judgment Debtors refunded the security deposit amount and it would mean continuation of the personal privilege. It was then contended that in that case, mere license was created in favour of the Applicants therein, which cannot be compared to a contractual obligation in favour of the purchaser under contract of sale in respect of the immovable property. In the alternative, it was contended that if the Court were to accept the stand of the Applicants therein that they were entitled to retain the possession under the Security Deposit Agreement, even then, the right in the property is not created in favour of the Applicants therein because the Security Deposit Agreement has not been registered under Section 17 of the Registration Act.

12. The next argument noted in that case is that, in the case of Agreement for Sale, the contractual obligation is attached to the ownership, whereas, it is not so in the case of a contractual obligation being created under the

Leave and License Agreement-because the Leave and License Agreement only confers privilege on the Applicants and also because that privilege comes to an end when the property is sold and when the ownership rights of the Judgment Debtor stands extinguished by sale of the property on execution of the Decree. Whereas, in the later case, obligation is annexed to the ownership of the immovable property, the obligation is enforceable against the transferee for value with notice. All these contentions were considered and have been answered in Paragraph 9 of the said Judgement.

13. The Court went on to accept the first argument pressed into service on behalf of the Bank that in that case, Leave and Licence Agreement clearly indicates that there is no right or interest in the property which is created and transferred in favour of the Applicants and that the same was only a personal privilege, which comes to an end when the right, title and interest of the Judgment Debtor stood extinguished unlike in the case when the contractual obligation/right is created under the agreement for sale of land in

favour of the purchaser. Insofar as that view is concerned, there can be no two opinions. Even in the present Agreement, as mentioned earlier, it does indicate that it is Leave and Licence Agreement. However, on fair scrutiny of the document as a whole and proper construction of all the relevant clauses, it would appear that Clause 28 is a provision regarding Agreement of Security Deposit, which is independent of Leave and Licence Agreement. Even on fair reading of this reported Judgment in the case of **The Hongkong & Shanghai Banking Corporation Ltd. (supra)**, in my opinion, it has not analysed the efficacy of Security Deposit Agreement, so as to hold that even that Agreement results in creating only licence and no other right. On the other hand, on reading the latter part of the reasons in Para 9, it appears to me that the Court went on to consider the argument of the Bank that the Security Deposit Agreement creates lien in favour of the Applicants therein. If it was so, registration of such Agreement was imperative. On account of failure to register such Agreement, the same cannot be invoked, nor pressed into service, in view of the mandate of Section

17(1)(b) of the Registration Act. This submission has been accepted in the said Judgment. There can be no two opinions even with regard to that conclusion reached in the said Judgment.

14. In the present case, however, it is not in dispute that the Agreement in question has been registered. In that sense, there is compliance of Section 17(1)(b) of the Registration Act. It is a different matter whether the stamp duty paid for the purpose of registration of document as a Mortgage Deed or lien Deed is adequate or otherwise. That will not undo the execution and registration of the document, which has already been entered into between the parties. I shall address this aspect a little later.

15. Suffice it to observe that the Judgment pressed into service is of no avail to the Plaintiffs. Counsel appearing for the Respondents, however, placed strong reliance on the statement appearing at page 44, which is part of Para 9 of the same Judgment, which reads thus :

> "In the present case, the Leave and Licence Agreement created only a bare licence. Therefore, as and when the rights of the Licensor comes to an end, he creases to be the owner when the property is put to sale pursuant to the above decree then, in that event, the licensee cannot claim to retain possession under the Leave and Licence Agreement or under the Security Deposit Agreement."

16. According to the Counsel for the Plaintiffs, this would mean that the Court has opined that even the purpose of Security Deposit Agreement was no different than to create licence in favour of the Applicants therein. This submission does not commend to me. Whereas, the paragraph No.9 will have to be read as a whole. As mentioned earlier, my understanding of Para 9 is that the matter has proceeded on the assumption that the Security Deposit Agreement had created right of "lien" in favour of the Applicants therein, but the same was of no avail, as the document was not registered as was required by Section 17 of the Registration Act. No more and no less.

17. The only other reason that can be

discerned from the Judgment is from Paragraph 11 thereof. That reasoning proceeds on the basis that the right created in favour of the Applicants therein is only a licence. In that context, provisions of Section 52 and 59 of the Indian Easements Act, 1882 have been adverted to and the Court proceeded to answer the issue against the Applicants therein.

18. In the present case, as mentioned earlier, the Agreement executed is a composite agreement of Leave and license Agreement and Security Deposit Agreement, though titled as Leave and Licence Agreement. The agreement has been duly registered. Counsel for the Plaintiffs, however, contends that the document has been registered in the context of provisions of Maharashtra Rent Control Act, 1999 on account of Section 24 of that Act read with Bombay Stamp Act, in particular, Article 36A(b). It was argued that the document has not been registered as mortgage as such. The fact remains that the document is a registered document. So far as mortgage deed is concerned, the stamp duty payable thereon is to the extent of 1% of the mortgage

money in terms of Article 14 read with Article 25 of the Bombay Stamp Act, 1958, on payment of stamp duty to the extent of Rs.32,15,000/- (Rupees Thirty-two Lakhs Fifteen Thousand). Wheres, the stamp duty paid for the purpose of registration of the present document is only Rs.3,35,000/- (Rupees Three Lakhs Thirty-five Thousand). Indeed, the stamp duty paid on the document is inadequate. That does not mean that the document is not registered. In such a case, the original document will have to be impounded and sent to the Registrar for taking steps in accordance with law.

19. On the above reasoning, all the decisions which are pressed into service on behalf of the Plaintiffs on the assumption that the right created in favour of the Applicants is only one of licence, will be of no avail. The decisions relied upon in the case of **A.I.R. 1931 Mad. 216 in the case of Chinnan & Ors. vs. Ranjithammal, A.I.R. 1986 Mad.L.J.212 in the case of Ram Seeta Educational Trust vs. The Swarnapuri Co-operative House Building Society Ltd. and 2003 (4) Bom.C.R. 745 in the case of Suresh Malappa Shetty vs. Special**

Recovery Officer deal with the situation where the right created is one of licence only. Accordingly, those decisions will be of no avail to decide the point in issue.

20. Assuming that the right created under the said Agreement was not one of mortgage; even so, for the nature of provision made in Clause 28, there can be no difficulty in accepting the argument of the Applicants that the said Agreement at least creates right of lien in favour of the Applicants. Even in the case of **The Hongkong & Shanghai Banking Corporation Ltd. (supra)**, the matter proceeded on the argument that Agreement of Security Deposit would at the highest, is a contractual lien, though not a statutory lien. Perhaps, taking clue from the said argument, which has been noted in Paragraph 9, Counsel for the Applicant submits that the terms provided in Clause 28 read with Clause 19 of the Agreement will have to be construed as creating right of lien in favour of the Applicants. The purport of lien has been considered by the Apex Court in the decision reported in **AIR 1992 SC 496 in the case of Triveni**

Shankar Saxena vs. State of U.P. & Ors. It will be useful to reproduce paragraphs 17 to 19 of the said Judgment, which reads thus :

> "17. We shall now examine what the word ‘lien’ means. The word ‘lien’ originally means "binding" from the Latin ligament. Its Lexical meaning is "right to retain". The word "lien" is now variously described and used under different context such as ‘contractual lien’, ‘equitable lien’, ‘specific lien’, ‘general lien’, ‘partners lien’, etc. etc. In Halsbury’s Laws of England, Fourth Edition, Volume 28 at page 221, para 502 it is stated:
>
> > "In its primary or legal sense "lien" means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims are satisfied."
>
> 18. In Stroud’s Judicial Dictionary, 5th Edition, Volume 3 at page 1465 the following passage is found:
>
> > "Lien. (1) A lien - (without effecting a transference of the property in a thing) - is the right to retain possession of a thing until a claim be satisfied; and it is either particular or general. So, as regards Scotland, "lien" is defined as including "the right of retention" (Sale of Goods Act 1893 (c.71), S.62), or it "shall mean and include right of retention" (Factors (Scotland) Act, 1890 (c.40),

> S.1); See hereon Great Eastern Railway v. Lords Trustees (1909) AC 109."

In Words and Phrases, Permanent Edition Vol.25 the definition of word ‘lien’ when used to explain the equitable lien is given thus:

> "A ‘lien’ from a legal stand-point, embodies the idea of a deed or bond, and necessarily implies that there is something in existence to which it attaches."

At page 393 of the same volume it is stated:

> "The word ‘lien’ has a well known signification. In law it signifies an obligation, tie, or claim annexed to or attaching upon any property, without satisfying which such property cannot be demanded by its owner, vide Storm v.Waddell, N.Y., 2 Sandf.Ch 494, 507, 508."

Again at page 399 of the same Volume it is stated :

> "Lien" is a term of very large and comprehensive signification, but which never imports more than security, vide Mobile Building and Loan Ass’n v. Robertson, 65 Ala 382, 383."

19. In Black’s Law Dictionary, 6th Edition, at page 922 the following passage is found :

> "The word ‘lien’ is a generic term and, standing alone,

> includes liens acquired by contract or by operation of law."

21. I have already adverted to the scope of Clause 19 and Clause 28 of the Agreement in the earlier part of this order. There can be no difficulty in accepting the argument of the Applicants that the right flowing from the said clauses in any case would be in the nature of contractual lien.

22. Taking any view of the matter, it is not possible to accept the argument that the agreement is simplicitor a Leave and Licence Agreement, which creates only a licence in favour of the Applicants and no other right. Viewed in this perspective, the Applicants ought to succeed in the present Chamber Summons.

23. Accordingly, Chamber Summons is allowed by directing amendment of the terms and conditions of sale, so as to recognise the right of the Applicants to remain in possession of the flat, till the obligation arising under the Agreement

dated 8th October 2001 is not discharged and the said amount is not refunded to the Applicants herein.

24. It is made clear that this decision is not an expression of opinion with regard to the claim of the Applicants in regard to the accrued interest, one way or the other.

25. The Applicants are directed to deposit the original Agreement dated 8th October 2001, which is required to be impounded and proceeded against in accordance with law. The Applicants shall deposit the original Agreement in the Office of the Prothonotary and Senior Master within twelve weeks from today.

26. It is once again clarified that the Judgment Debtor No.2, who has appeared through Counsel, has not contested the issues that arises in the present Chamber Summons and instead, has accepted execution of the Agreement dated 8th October 2001 in favour of the Applicants as well as his liability to discharge the obligation arising

from the said Agreement.

27. It is further made clear that the sale of the flat in question on the basis of amended proclamation and terms and conditions of sale in terms of this order, may proceed unaffected by the adjudication proceedings under the Stamp Act in relation to the Agreement dated 8th October 2001.

28. Chamber Summons disposed of on the above terms.

A.M.KHANWILKAR, J.